ground that any other result would brand the innocent second wife as an adulteress. But this device only half accomplishes its purpose, for though it protects the second wife from the equally innocent plaintiff, still the State, not subject to such an estoppel, could apparently convict her of adultery, and could certainly convict the husband of bigamy.[15] The necessity for all these inconsistencies might be obviated by giving the fullest validity to the decree of a foreign jurisdiction where one of the parties is domiciled, if based upon actual notice to the other.

EQUITABLE CONVERSION AND THE RULE AGAINST PERPETUITIES.—It is a fundamental principle that equity considers as done that which ought to have been done. Accordingly, where land is devised or conveyed in trust to be sold and converted into money, equity will consider it as personalty after the death of the testator[1] or the delivery of the deed,[2] and thus, through the beneficent fiction of conversion, give effect to the intention of the testator or grantor.[3] It is in the settlement of controversies between the heirs and representatives of the testator that this doctrine is generally invoked, but occasionally, as in the recent case of *Peabody et al.* v. *Kent et al.* (1912) 138 N. Y. Supp. 32, a much wider application is sought. The grantor, who was domiciled in Massachusetts, conveyed land in New York to certain trustees in other States with a direction to sell and to set aside the proceeds in a fund for division among certain beneficiaries, a part in five years and the remainder in ten years after the delivery of the deed. Under the law of New York the trust was invalid in that it suspended the power of alienation of the proceeds for a gross term. The grantees claimed, however, that the land had been converted into personalty by the direction to sell contained in the deed, and that the validity of the conveyance was therefore to be determined by the law of the domicile of the owner, under the rules of which the transfer would be upheld. The court, while it assumed that the conversion had been effected, held nevertheless that the law of New York was to be applied, because the trust was to be administered temporarily in that State, and accordingly declared the deed invalid.[4]

Under the assumption taken by the court that the land was to be regarded as personalty, the decision is clearly at variance with the policy heretofore adopted by the New York courts of localizing the effects of the New York rule against perpetuities.[5] In accordance

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[15] People *v.* Baker (1879) 76 N. Y. 78.

[1] Fisher *v.* Banta (1876) 66 N. Y. 468; 3 Pomeroy, Equity Jurisprudence, (3rd ed.) § 1162.

[2] Loughborough *v.* Loughborough (Ky. 1854) 14 B. Mon. 549; Griffith *v.* Ricketts (1849) 7 Hare 299.

[3] Jarman, Wills, (6th ed.) 743; Page, Wills, § 708. The duty to sell, if not created by express direction, may be implied from the circumstance that the purposes of the trust cannot be carried out unless the land is sold and turned into money. Page, Wills, § 703.

[4] *Cf.* 2 Wharton, Conflict of Laws, (3rd ed.) 1321; Gardner, Wills, 308; Penfield *v.* Tower (1890) 1 N. D. 216. The trustees were allowed, however, to foreclose a mortgage against the defendants, for the heirs of the grantor had not attacked the title acquired by the trustees under the deed.

[5] See Dammert *v.* Osborn (1893) 140 N. Y. 30, 41.

with this policy the general rule, that the validity of a disposition of personal property is to be determined by the *lex domicilii*,[6] has been accepted to the extent that a trust, validly created by the law of a foreign jurisdiction where the testator was domiciled, will not be declared invalid, though that trust would be illegal under the rules of New York, where it is to be administered.[7] On the other hand, the courts have departed from that general rule to sustain a trust created by a person domiciled in New York, and invalid under the law of that State, when the trust was to be administered in another jurisdiction, by the rules of which it would be upheld.[8] It would seem, then, that to bring a gift in trust of personalty within the New York rule against perpetuities that the testator or grantor must not only have been domiciled in that State but must also have contemplated the administration of the trust there,[9] or at least must not have directed the administration to be performed elsewhere.[10] As in the case under discussion, however, neither the grantor nor any of the trustees were domiciled in New York, the reasons given for the decision are obviously insufficient to justify the result reached by the court.

The so-called conversion of land into personalty is purely fictional, however, since no physical change is effected in the character of the property, and title acquired by the trustees under the gift will attach in fact to the land.[11] If the terms of the deed by which the title was acquired are repugnant to the *lex rei sitae*, it would seem, then, that the court would be justified in ignoring the fiction of conversion, and in declaring the gift invalid.[12] For while the court may concededly ignore the real character of the subject-matter conveyed by the deed for the purpose of carrying out the intentions of the grantor, it is equally clear that the court may justifiably refuse to shut its eyes to the actual facts, when the intentions sought to be effectuated run contrary to a well-settled policy of the jurisdiction. The decision in *Peabody* v. *Kent* cannot be sustained on this ground, however, for the deed contained no provisions repugnant to the New York rules governing the transfer of land. There was no suspension of the power of alienation of the land, since at any time after acquiring title the trustees could, in their discretion, have conveyed an absolute fee in possession.[13] Nor was there any invalidity under the second New York rule against perpetuities, enunciated apparently for the first time[14] in the case of *Matter of Wilcox*,[15] and directed against remote vesting,

[6] 2 Wharton, Conflict of Laws, (3rd ed.) 1283.

[7] Cross *v.* U. S. Trust Co. (1892) 131 N. Y. 330; see Dammert *v.* Thompson *supra;* Roosevelt *v.* Porter (N. Y. 1901) 36 Misc. 441; *cf.* Fellows *v.* Miner (1876) 119 Mass. 541; Sewall *v.* Wilmer (1882) 132 Mass. 131.

[8] Hope *v.* Brewer (1892) 136 N. Y. 126; Kennedy *v.* Palmer (N. Y. 1873) 1 Thomp. & C. 581; *cf.* Manice *v.* Manice (1871) 43 N. Y. 303, 388; Chamberlain *v.* Chamberlain (1871) 43 N. Y. 424; Fordyce *v.* Bridges (1848) 2 Phil. 497, 515.

[9] See Dammert *v.* Thompson *supra.*

[10] See 2 Wharton, Conflict of Laws, (3rd ed.) 1325.

[11] See Wilder *v.* Ranney (1884) 95 N. Y. 7; McElroy *v.* McElroy (1902) 110 Tenn. 137, 146.

[12] See Brook *v.* Badley (1868) L. R. 3 Ch. App. 672; (1867) L. R. 4 Eq. 106; Hobson *v.* Hale (1884) 95 N. Y. 588, 609.

[13] See Robert *v.* Corning (1882) 89 N. Y. 225.

[14] See 9 COLUMBIA LAW REVIEW 338.

[15] (1909) 194 N. Y. 288.

for the trustees took an indefeasible fee and there was no provision in the deed of trust for the passing of the title to the land to anyone else upon any contingency. The gift of the land, therefore, was unimpeachable, and the interference of the court could be justified only upon the theory that the trust in the proceeds violated the New York rule against perpetuities. But, as said above, the validity of a trust in personalty should be determined by the law of the domicile of its creator, and as the trust in this case was valid by the law of Massachusetts, it would seem that it should have been sustained.

EFFECT OF THE SURRENDER OF A LEASE.—A well recognized method for the termination of a lessee's interest is by surrender to his landlord.[1] In accordance with general principles of merger this has the effect of utterly destroying the lesser interest, which is swallowed up by the greater reversion.[2] An exception is made, however, when the rights of a third person intervene, and the merger will not be permitted to injure one who has acquired from the lessee an interest connected with the lease. To allow a surrender of a lease to terminate the rights of a sublessee[3] would be obviously inequitable and would open the door to endless fraud and collusion. It was early decided, therefore, that a subtenant retains his interest in the property until it expires either by the terms of his own lease or of that of his immediate lessor.[4] There have been attempts to justify this on grounds of strict logic, on the theory that the subtenant has a vested right which cannot be affected by any merger of interests held by other parties.[5] But at early common law a tenant had nothing more than a contract right against his immediate overlord,[6] and even to-day the subsistence of his interest seems to be totally dependant upon a continuance of the interest under which he holds. An illustration of this proposition is found in the familiar principle that a sublease is ended upon the termination by its terms of the interest of the immediate lessor.[7] Therefore, if the surrender of a lease works the destruction by means of merger, the contemporaneous destruction of all subleases would seem to be a necessary consequence. The true explanation of the continued existence of the sublease probably results in a disparagement of the doctrine of merger; that since this is merely a technical rule of law its operation will not be permitted to injure the rights of the subtenant, and the lease will therefore be regarded as having sufficient

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[1] 2 McAdam, Landlord & Tenant, (4th ed.) § 399. Surrender is either in express terms, or by operation of law, when the parties do some act which implies that they have both agreed to consider the surrender as made, as by making a new lease going into effect before the old one would have expired. 2 Taylor, Landlord & Tenant, (9th ed.) § 507.

[2] 1 Tiffany, Real Property, § 52-*c et seq.*

[3] In the absence of a stipulation to the contrary a tenant may freely sublet. Jones, Landlord & Tenant, § 431.

[4] Mellor *v.* Watkins (1874) L. R. 9 Q. B. 400; Eten *v.* Luyster (1875) 60 N. Y. 252; Mitchell *v.* Young (1906) 80 Ark. 441.

[5] See Krider *v.* Ramsay (1878) 79 N. C. 354; Ritzler *v.* Raether (N. Y. 1881) 10 Daly 286; Pleasant *v.* Benson (1811) 14 East 234; note to Mitchell *v.* Young (Ark. 1906) 7 L. R. A. [N. S.] 221.

[6] Challis, Real Property, (3rd ed.) 425, 426; 1 Tiffany, Real Property, § 36.

[7] 1 Tiffany, Landlord & Tenant, § 162.